IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 493 of 1993

in

SPECIAL CIVIL APPLICATION No. 2051 of 1992

For Approval and Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJPUT KANAIYALAL BABULAL

Versus

CHAIRMAN/I O C

Appearance:

1. LETTERS PATENT APPEAL No. 493 of 1993

MR KB PANDE for Appellant.

MR MANISH R BHATT for Respondent No. 1

NOTICE SERVED for Respondent No. 2-3

Ms. Manisha Lavkumar AGP for Respondent No. 4

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT

and

MR.JUSTICE K.A.PUJ

Date of decision: 07/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

This Letters Patent Appeal is filed against the order and judgment of the learned Single Judge passed in Special Civil Application No. 2051 of 1992 on 2nd November 1993 whereby the petition challenging the termination order dated 21st October 1991 was dismissed.

2. It is the case of appellant-original-petitioner that the appellant was called for interview for the post of General Handyman, Grade-III by the respondents on 19th March 1991 and since the appellant was found successful he was sent for medical examination and thereafter the appointment letter was issued to the appellant and after completing all formalities the appellant was allowed to resume on 29.4.1991. The appellant-petitioner was appointed on probation for a period of six months from the date of his appointment. During this probation period the petitioner's services were terminated by an order dated 21st October 1991. The grievance of the appellant was that no reason was assigned while terminating the services of the appellant. The appellant had challenged the said order of termination before the appellate authority and since there was no reply from the appellate authority in response to the said appeal, the appellant filed Special Civil Application No. 2051 of 1992 before this Court. In the said petition, an affidavit-in-reply was filed by the respondent from which the appellant has contended that the petitioner's termination was not a simple termination but it was penal in nature and casts stigma against the petitioner. No procedure was followed by the respondent authority nor any show cause notice was issued and hence the said order is in violation of the principles of natural justice and also contrary to the binding decisions of the Hon'ble Supreme Court as well as this Court.

3. The learned Single Judge of this Court, after having dealt with the rival contentions and submissions of learned advocates appearing for their respective parties had come to the conclusion that under the terms and conditions of the appointment, the respondents were entitled to put an end to the services of the appellant, without notice and without assigning any reason during the probationary period. On realising the challenge, the respondents have resorted to that entitlement and have

terminated the services of the petitioner. The said order of termination therefore could not be said to be suffering from the violation of principles of natural justice nor could it be said to be arbitrary. The learned Single Judge had further observed in his order that the appellant's entry in the services of the respondent was not an entry in the regular channel and such an entry could only be put an end to without holding an inquiry against him or without giving any notice to him. The order of termination was therefore held to be illegal and valid. It is this order of the learned Single Judge, which is under challenge before us in this Letters Patent Appeal.

4. Heard Mr. KB Pande, learned advocate appearing for the appellant and Mr. Manish R. Bhatt, learned advocate appearing for respondent No.1 and learned AGP, Ms. Manisha Lavkumar appearing for respondent No.4. No one appears on behalf of respondents No. 2 and 3 though they were duly served. Mr. Pande has submitted that the order passed by the learned Single Judge suffers from non-application of mind as the learned Single Judge has failed to appreciate that the name as well as the number of the appellant was not part and parcel of the said so-called FIR which was produced before the Court. The appellant was not at all responsible in any manner when there was no connection of the appellant with the so-called mismanagement on the part of the Office of the Employment Exchange, Baroda. It was further stated that the order of termination of the service of the appellant passed by the respondents is penal in nature and clearly casts stigma and since the said order was passed without giving any opportunity of being heard and without holding any departmental inquiry or without issuing any show cause notice, the said order ought to have been quashed and set aside by the learned Single Judge. Mr. Pande has further submitted that the Hon'ble Supreme Court as well as this Court had held in number of decisions that any order which is detriment to the petitioner/appellant which can cause economic death to the petitioner and his family which is apparently penal in nature, cannot be passed without giving any opportunity of being heard and without holding proper inquiry in the matter. He has further submitted that such an order is bad in law and violative of Articles 14 and 16 of the Constitution of India and is also violative of the principles of natural justice. In support of his submissions, Mr. Pande has relied on the decision of the Hon'ble Supreme Court in the case of Samsher Singh vs. State of Punjab and another - AIR 1974 SC 2192, wherein it is held as under;

".....The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The Order of termination is illegal and must be set aside."

5. Mr. Pande has further relied on the decision of the Hon'ble Supreme Court in the case of Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd., and another - AIR 1999 SC 609, wherein it is held as under;

"In cases where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report, the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the inquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental inquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. There are obviously not cases where the employer feels that there is a mere cloud against the employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry Officer, which are all arrived at behind the back of the employee - even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive, in such cases."

6. Mr. Pande has also relied on the decision of the Hon'ble Supreme Court in the case of Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd and Ors. - JT 2003 (2) SC 162, wherein it is held:

"Whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simpliciter but the real face behind it is to get rid of services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct.(Para 12)".

7. Over and above the oral submissions as well as the reliance placed on the aforesaid authorities, Mr. Pande has filed Written Arguments today in course of the hearing and the same were duly considered. On the basis of the oral as well as written submissions and on the basis of the authorities cited before this Court, Mr.

Pande has submitted that the termination order passed by the respondent authorities is absolutely illegal, unlawful, violative of principles of natural justice, and contrary to judicial pronouncements and hence the same deserves to be quashed and set aside. Since the learned Single Judge has confirmed the said order for the reason stated in the impugned judgment the same also deserves to be quashed and set aside.

8. Mr. Manish R. Bhatt, learned advocate appearing for the respondent No.1, on the other hand, has supported the action of the respondent authorities as well as the order passed by the learned Single Judge dismissing the petition filed by the appellant. He has submitted that the appellant was under probation and since it was found that the appellant's appointment was void from the very inception, the services of the appellant were terminated invoking Clause 3 of the appointment order. It was further submitted that as per the certified standing orders applicable to the respondent Corporation, more particularly Clause 21.2.5 the termination of the workman during or at the end of the period of his probation in accordance with the terms of his appointment is not termed as penalty. Since the appellant's services were terminated during the period of probation in accordance with the terms of his appointment, there was no question of giving any opportunity which has been so contended by the appellant before the learned Single Judge as well as before this Court in this Letters Patent Appeal. He has further submitted that the appellant has suppressed the material fact from the Court and there was a big racket and investigations are going on to find out as to how the fake list was prepared wherein the appellant's name was included. He has further submitted that the learned Single Judge has at length taken into consideration this vital aspect of the matter and came to the conclusion that the appellant's name was sponsored by the Employment Exchange not in a regular manner, but that sponsoring was the result of a fraud. The appellant's name was never registered with the Clerical Exchange Office and the respondents had never called names from the Technical Exchange Office. They had however called for the names from the Clerical Exchange Office and the Clerical Exchange Officer could never have, in fact, sponsored the name of the appellant but on coming to know of the fact that the respondents had called for the names from the Clerical Exchange Office, one Mr. Ghanshyam Mehta working in the Technical Exchange Office, committed a fraud and sent a fake list of these persons, wherein the name of the appellant came to be inserted at Sr. No. 5 and it was so managed that the appellant would be the

only candidate out of the six candidates in the list, who would be qualified for the post in question. The learned Single Judge has therefore rightly held that the appellant's name apparently came to be sponsored by the Employment Exchange. However, in reality, his name was never sponsored by the Employment Exchange and the sponsoring of his name by the Technical Exchange Office was the result of a fraud and everything that followed thereafter would, therefore, be vitiated for, the original source was highly vitiated. Mr. Bhatt has further submitted that this factual profile was not revealed in the termination order only because this would not come in the way of the appellant while seeking other jobs. He has further submitted that subsequent averment in the affidavit-in-reply would not change the character of the termination order and it would not convert the termination simpliciter into penal termination and on that basis it cannot be alleged that the order was penal in nature or stigmatic. In support of his submissions, Mr. Bhatt has relied on the decision of the Hon'ble Supreme Court in the case of H.F. Sangati vs. R.G., High Court of Karnataka - AIR 2001 SC 1148, wherein it is held as under;

> "Appellants, appointed as Munsif on probation were discharged by an order which records - "they are unsuitable to hold post of Munsifs." The Administrative Committee of the High Court having took into consideration all the relevant material, thereafter formed an opinion as to the unsuitability of the two appellants to hold the post of Munsifs, which opinion was communicated to and upheld and accepted by the Full Court of the High Court and pursuant thereto, the State Government issued the impugned order of discharge from service, the impugned order of discharge from service, the impugned order of discharge does not cast any stigma on the appellants. Rule 6 contemplates a probationer being discharged from service on one or more of the following grounds : (1) in terms of a condition imposed by the rules, (ii) in terms of the order of appointment, or (iii) on account of unsuitability of the appointee for the service or post. Sub-rule (2) of Rule 6 requires an order discharging the probationer to indicate the grounds for the discharge. It also provides that such indicating of the grounds for the discharge in the order would not require any formal proceedings under the Karnataka Civil

Services (Classification, Control and Appeal) Rules, 1957 being held. The impugned order of discharge has been passed in strict compliance with the requirements of R.6. It does not cast any stigma on the appellant probationers, nor is it punitive. There was, thus, no requirement to comply with the principles of natural justice much less to be preceded by any formal proceedings of enquiry before making the order."

9. Mr. Bhatt has further relied on the decision of the Hon'ble Supreme Court in the case of Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences and Another - (2002) 1 SCC 520, wherein it is held as under;

"Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude. Whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states that is implicit in every order of termination of a probationer's appointment, is also not stigmatic. In order to amount to a stigma, the order must be in a language which impures something over and above mere unsuitability for the job."

"It cannot be held that the enquiry held prior to the order of termination turned the otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge-sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. None of the three factors catalogued above for holding that the termination was in substance punitive exists in the present case.

An affidavit cannot be relied on to

improve or supplement an order. Equally, an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order."

On the basis of the facts and circumstances of the case as well as on the basis of the authorities relied upon by Mr. Bhatt, it is strongly urged that the order and judgment passed by the learned Single Judge against the order should not be interfered with and the appeal filed by the appellant should be dismissed with costs.

10. We have heard the learned advocates appearing for the respective parties and we have also gone through the records of the case as well as the memo of Special Civil Application and the appeal memo along with documents attached. We have also gone through the reply affidavit as well as the Rejoinder filed in the main petition and we have further perused the written arguments filed on behalf of the appellant. The authorities relied upon by the learned advocates for the parties were also duly considered by us. Here in the present case, the respondent No.1 could succeed before the learned Single Judge as well as before us to demonstrate that it was through a fraud that the name of the appellant came to be sent from the office of respondent No.4 to the office of respondent No.3. The facts demonstrated before us have led to the only conclusion that the entry of the appellant in the services of the respondents No. 1, 2 and 3 was the result of a fraud, a back-door entry and the same could have been set right by respondents No. 1, 2 and 3 by resorting to the Condition No.3 of the appointment letter by which the respondents Nos. 1 to 3 were entitled to terminate the services of the appellant during the probation period without giving any notice and without assigning any reason. We find no substance in the submission made on behalf of the appellant that the decision to terminate the services of the appellant was not taken by the respondent No.1 but the same was taken by the respondent No.4. In the case of a probationer and especially when the order of termination simpliciter is passed by the employer, no opportunity of any explanation is required to be given to the employee and hence the appellant was not given any show cause notice nor any explanation was called for before terminating his services as he was only on probation and no vested right was created in his favour. Even otherwise, the order of termination unquestionably is in the nature of termination simpliciter and no stigma was attached with that order. Since it was not punitive order, there is no

question of violation of principles of natural justice nor it is contrary to the constitutional provisions contained in Articles 14 and 16 of the Constitution of India. Even otherwise the contentions raised by Mr. Pande, learned advocate appearing for the respondents during the course of his oral arguments as well as in his written submissions are all disputed questions of facts and the Court cannot go into such disputed questions while exercising writ jurisdiction under Article 226/227 of the Constitution of India or appellate jurisdiction under Clause 15 of the Letters Patent. The authorities relied upon by Mr. Pande would also not render any assistance to the appellant as in Samsher Singh's case (Supra), the Hon'ble Supreme Court has recorded the factual background of the matter. It was observed that the Inquiry Officer nominated by the Director of Vigilance recorded the statements of the witnesses behind the back of the appellant. The inquiry was to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the Inquiry Officer reached the appellant. The Inquiry Officer gave his findings on allegations of misconduct and the High Court accepted the report of the Inquiry Officer and wrote to the Government on 25th June 1969 that in the light of the report, the appellant was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report. It is on these facts that the Court has held that the order of termination of the services of Ishwar Chand Agarwal was clearly by way of punishment in the facts and circumstances of the case, and the passage quoted from this judgment in the earlier part is on the basis of the above facts found by the Hon'ble Supreme Court. The appellant's case is quite distinguishable from the case before the Hon'ble Supreme Court and hence the observations made could not be applicable to the facts of the appellant's case. In Radhey Shyam Gupta's case (Supra), the Hon'ble Supreme Court has found, as a matter of fact, that where the Inquiry Officer examined witnesses, recorded their statements, and gave a clear finding of the appellant accepting a bribe and even recommended his termination, and all these things were done behind the back of the appellant and thereafter the Managing Director passed the termination order from next day, it cannot be said by any stretch of inspection that the report is a preliminary inquiry report and it is a obvious case where the report and its findings are the foundation of the termination order and not merely the motive. It is in these facts, the Hon'ble Supreme Court has held that the termination order passed was punitive and was violative of principles of natural justice.

Here, in the case on hand, neither any inquiry was held nor any statement was recorded by the respondent authorities. The information gathered from the Employment Exchange goes to the very root of the matter and it affects the very entry of the appellant in the respondent organisation and after having found the true and correct facts about the initial appointment of the appellant which was obtained through fraud, the respondent authorities have passed the order of termination which cannot be said to be punitive or stigmatic. The third authority relied on by Mr. Pande, in the case of Mathew P. Thomas (Supra) would not also come to the rescue of the appellant as the Hon'ble Supreme Court has specifically held that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Looking to the facts of the present case, it is not open for this Court to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of the petitioner. Even if such an attempt is made, it could lead to the only conclusion as indicated above to the fact that the efforts were made to find out the suitability of the person to continue in service and not to remove the appellant from service on the foundation of his misconduct.

11. As against this, there is sufficient force and substance in the argument of Mr. Bhatt, the learned advocate appearing for respondent No.1 and also the authorities cited by him could obviously be pressed into service. As stated earlier, the appellant's entry in the organisation itself is through dubious method. The appellant was in probation and during the period of probation he was removed from the service. The order does not indicate any sort of misconduct or any stigmatic remarks in the order. The subsequent facts have come on record only when the appellant had challenged the order of termination before this Court and in affidavit-in-reply certain facts relevant to the issue were brought to the notice of the Court. On the basis of those facts stated in the affidavit, it cannot be said that the order passed by the authorities is a punitive order. The Hon'ble Supreme Court has made it very clear in the case of Pavanendra Narayan Verma (Supra) that an affidavit cannot be relied on to improve or supplement an order. Equally, an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order. Here also, the appellant's main grievance against the order, not being

an order of termination simpliciter but the punitive order, is that in the affidavit-in-reply it was stated that the appellant's entry in the organisation was obtained through fraud and since this was stigmatic, the order would also assume the character of a punitive order. Such a contention cannot be accepted in the light of the above observations made by the Hon'ble Supreme Court.

12. Having regard to the facts and circumstances of the case and having regard to the discussions made hereinabove, we are of the view that the learned Single Judge has rightly considered all the aspects of the matter and come to the correct conclusion by dismissing the petition and upholding the order of termination. We, therefore, dismiss this Letters Patent Appeal. No order as to costs.

[J.N. Bhatt, Actg.C.J.]

rmr. [K.A. Puj, J.]